United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 19, 2007

TO : Cornele A. Overstreet, Regional Director
Region 28

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Teamsters Local 631 (Wesley Corporation) 560-2575-6713
Case 28-CE-61 584-3740-5900

This case was submitted for advice as to whether contract language that limits the subcontracting of off-site work to either union signatories or subcontractors that pay the same aggregate of wages and benefits of the contract is facially unlawful under Section 8(e) of the Act. Another question presented is whether the Union violated Section 8(e) by filing certain grievances seeking an unlawful interpretation of the contract.[1]

We conclude that the contract language in this case is a facially valid union standards provision and that, absent withdrawal, the Section 8(e) charge should be dismissed. We also conclude that even if the Union's grievances seek an unlawful secondary interpretation of the contract, they would not violate Section 8(e) because the grievances alone did not create an "agreement" to the unlawful interpretation, as there was neither Employer acquiescence nor an arbitration award interpreting the provision unlawfully.

Basic Facts

Teamsters Local 631 (the Union) is party to a collective-bargaining agreement with the Nevada Contractors Association. Wesley Corporation (the Employer), an excavation contractor, is a member of the association and is covered by the Agreement. Article I, subsection D of the parties' Agreement provides the following concerning off-site work:

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[1] Similar issues are presented in Case 28-CE-62, involving the Union's attempts to enforce a similar, but not identical, provision. That case is also pending in Advice and will be addressed in a separate memorandum.

4. OFF SITE WORK.

The following conditions must be met prior to subcontracting of bargaining unit work.

The Employer may subcontract out off site work only when (1) that Employer has utilized all equipment owned, leased, or rented by the Employer and such equipment is operated by Employees covered by this Agreement and (2) there is no available rental/lease equipment in Southern Nevada.

If numbers 1 & 2 above are met then the Employer may sub-contract out offsite work under *either a or b below*: (emphasis added)

a. The subcontractor is signatory to an agreement with the Union containing terms and conditions identical to the terms and conditions contained in this Agreement, and the Employees of the subcontractors that performed the work historically or customarily performed by the Employees of the Employer, are employed under identical terms and conditions as those contained in this Agreement; ....

b. If the Employer subcontracts any off site work covered by this Agreement to any person, contractor, or other entity who is not signatory to this Labor Agreement, the Employer shall (1) require in support of its subcontract that the subcontractor's Employees be paid the same aggregate of wages and fringe benefits as Employees covered under this Labor Agreement ....

Action

Section 8(e) makes it unlawful for a union and an employer to "enter into" any agreement, express or implied, to cease doing business with any other person. However, not all agreements resulting in a cessation of business are subject to Section 8(e). So-called "union standards" clauses, which seek to limit subcontracting of unit work to employers that maintain the same employment standards as those enjoyed by unit members, are lawful because the union has a "legitimate primary interest in preserving unit work for unit employees and in ensuring that negotiated employment standards will not be undermined or circumvented

...."[2] A subcontracting clause is a lawful "union standards" provision designed for the primary purpose of removing the economic incentive to subcontract unit work if it requires subcontractors to comply with "the equivalent of union wages hours and the like,"[3] i.e., the economic provisions of the union contract.[4]

We conclude that the provision at issue here is a facially valid union standards provision. Although "clause a" on its own would constitute an unlawful union signatory clause, it must be read in conjunction with "clause b," which gives the Employer the alternative of contracting out its off-site work to employers who "pay the same aggregate of wages and fringe benefits" as employees covered by the Agreement. Since the contract explicitly provides that the Employer may subcontract out work to employers who either (a) are union signatories *or* (b) pay union standards, we cannot say that the Employer is obligated to abide by clause a.[5] Thus when read as a whole, the provision only prohibits the Employer from subcontracting to an employer that does not pay the prevailing wage, and is thus a facially lawful union standards clause.[6]

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[2] Associated General Contractors, 280 NLRB 698, 701 (1986).

[3] General Teamsters Local 386, 198 NLRB 1038, 1038 (1972).

[4] Id. at 1038-1039. See also Painters Orange Belt Dist. Council 48 (Painting Contractors), 277 NLRB 1470, 1475 (1986); Heavy, Highway, Bldg. and Constr. Teamsters, 227 NLRB 269, 272-273 (1976).

[5] See generally Heartland Industrial Partners, 348 NLRB No. 72, slip op. at 3-4 (November 7, 2006) (no 8(e) violation where disputed clauses on their face did not limit the employer's discretion to invest in or acquire any company or require it to cease doing business with anyone).

[6] We note that the provision does not require the subcontractor to comply with any specific term of the Agreement.

Compare Local 437, IBEW (National Electrical Contractors Assn.), 180 NLRB 420, 421 (1969) (stipulation by the parties that a provision allowed subcontracting to anyone who "abides by the union standards of wages, hours and working conditions" did not cure an otherwise unlawful secondary union-signatory subcontracting clause, where

Although the Union filed grievances with an arguably unlawful secondary object of requiring the Employer to cease doing business with non-unionized subcontractors, the Employer did not acquiesce in the Union's unlawful interpretation of the provision, and there was no arbitration award interpreting the contract provision unlawfully. Thus there was never a bilateral "agreement" to an unlawful interpretation of the facially valid provision. The mere filing of a grievance to enforce an unlawful interpretation of a facially valid contract clause does not create an "agreement" to cease doing business within the meaning of Section 8(e).[7] Accordingly, the Section 8(e) charge should be dismissed, absent withdrawal.

We note that a grievance seeking an unlawful secondary interpretation of a contract may violate Section 8(b)(4)(ii)(A), which prohibits a union from threatening, restraining, or coercing an employer with an object of forcing or requiring it to enter into an agreement prohibited by Section 8(e). However, no Section 8(b)(4)(A) charge has been filed. Moreover, it is unclear on the current record whether such a charge would be meritorious. We provide the following analysis to assist the Region in determining whether to solicit a Section 8(b)(4)(A) charge.

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there was no evidence that the stipulation was publicized as widely as the original unlawful clause and the stipulation required a subcontractor to adhere not only to the agreement's wage and hour provisions, but also to other contract working conditions that could be non-economic in nature).

[7] See, e.g., Sheet Metal Workers Local 27 (AeroSonics, Inc.), 321 NLRB 540, n. 3, (1996), where the Board noted in *dictum* that as a matter of law, "*solely unilateral* conduct by a union, for example, a threat of picketing or the mere filing of a grievance, to enforce an unlawful interpretation of a facially lawful contract clause does not violate Section 8(e) because such conduct does not constitute an 'agreement.'" (Emphasis in original; citations omitted.) See also American Federation of TV and Radio Artists (Westinghouse Broadcasting), 160 NLRB 241, 244, 247-48 (1966) (no 8(e) violation where the employer had refused to implement the clause as demanded by the union and hence there was no "entering into.").

Whether a grievance is coercion within the meaning of Section 8(b)(4)(ii) is generally determined under the principles of Bill Johnson's Restaurant v. NLRB, 461 NLRB 731, 743-745 (1983). That is, a grievance is unlawful coercion only if it is without reasonable basis in fact or law,[8] or if it has an unlawful object.[9] As to the latter, a grievance has an unlawful objective if it is predicated on a reading of the contract that would be unlawful.[10]

In this case, the record does not disclose the exact theory of violation the Union is pursuing in its grievances. It would be secondary to the extent the Union claimed that the Employer violated the contract simply by using "non-signatory" trucks at the jobsite. On the other hand, the Union's theory would be primary to the extent it claims only that the Employer violated the contract clause that allows subcontracting of off-site work only when there is no available rental/lease equipment in Southern Nevada or that the subcontractor's drivers were being paid sub-

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[8] See Longshoremen ILWU Local 7 (Georgia Pacific), 291 NLRB 89, 93 (1988), review denied 892 F.2d 130 (D.C. Cir. 1989; Teamsters Local 483 (Ida Cal), 289 NLRB 924, 925 (1988) (no 8(b)(4)(ii)(A) violation where union grieved and sought to compel arbitration through a Section 301 action over whether owner-operators were covered by labor agreement, where union's contention that owner-operators were employees was reasonable, union did not strike or picket, and there had been no prior adjudicatory determination regarding the owner-operators' status); Teamsters Local 83 (Cahill Trucking), 277 NLRB 1286, 1290 (1985) (grievance filed to enforce a colorable contract claim is not coercion within meaning of Section 8(b)(4)(ii)(A) or (B)); Heavy, Highway, Bldg. and Constr. Teamsters, 227 NLRB at 274 (same).

[9] Elevator Constructors (Long Elevator), 289 NLRB 1095 (1988), enfd. 902 F.2d 1297 (8th Cir. 1990); Service Employees Local 32B-32J (Nevins Realty), 313 NLRB 392, 392, 401-402 (1993), enfd. in pert. part 68 F.3d 490 (D.C. Cir. 1995). See also Bill Johnson's Restaurant v. NLRB, 461 NLRB at 737 n.5.

[10] Elevator Constructors (Long Elevator), 289 NLRB at 1095 (union violated Section 8(b)(4)(ii)(A) by pursuing a grievance premised on a contract interpretation that necessarily would constitute a de facto hot cargo provision in violation of Section 8(e)). Compare Teamsters Local 483 (Ida Cal), 289 NLRB at 925 (absent a clearly unlawful object, grievance was not coercive under Section 8(b)(4)(ii)(A)).

standard wages in violation of the union standards provision. The Union's subjective motive in bringing the grievance is largely irrelevant.[11] Rather, the issue is whether the Union's theory of its grievances requires an unlawful application of the contract or, if not, whether the Union has a reasonable factual and legal basis for its claim.

In sum, the Region should dismiss the Section 8(e) charge, absent withdrawal.[12]

B.J.K.

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[11] BE & K Construction Co. v. NLRB, 536 U.S. 516, 532-535 (2002).

[12] We note that the Union's statement to Perini that it would set up a picket line against SR Trucking and Transport appears to signal only an intent to engage in lawful primary picketing. See generally Local 453, IBEW (Southern Sun Electrical Corp.), 237 NLRB 829, 830 (1975) (no unlawful secondary object where union indicated, in response to neutral's inquiry, that picketing would cease when the primary was no longer on the job). Compare Local No. 441, IBEW (Rollins Communications), 222 NLRB 99, 100-101 (1976), enfd. 569 F.2d 160 (D.C. Cir. 1977), on remand from 510 F.2d 1274 (1975), denying enf. to 208 NLRB 943 (1974) (statements to a neutral conditioning the removal of a picket line upon some action to be taken by the neutral violated Section 8(b)(4)(B)).